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C O N F I D E N T I A L SECTION 01 OF 02 NAIROBI 001846

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SUBJECT: CONSTITUTIONAL REVIEW CHAIR CAUTIOUSLY OPTIMISTIC

Ref: Nairobi 1711

Classified By: PolOff Jonathan Howard for reasons 1.4 (B,D)

¶1. (C) SUMMARY. The Ambassador recently met with Nzamba Kitonga, Chairman of the Committee of Experts on the Constitution, to discuss the current status of the constitutional review process. Acutely aware that his committee is working under intense political and public scrutiny, Kitonga is nevertheless hopeful that the hybrid Presidential - Parliamentary system that the current draft proposes will be an acceptable compromise position between hardliners on both sides. Kitonga plans to unveil an initial rough draft constitution within the next few weeks for public comment. The Committee then plans to develop a final draft by December with a view toward holding a national referendum sometime between April and June. He requested support from the U.S. for technical expertise, civic education, and public messages calling on political leaders to accept a compromise constitution. In response to this request, USAID is signing a \$350,000 contract with the International Development Law Organization to provide subject matter experts to the Committee. END SUMMARY.

¶2. (C) The Ambassador recently met with Nzamba Kitonga, Chairman of the Committee of Experts on the Constitution, to discuss the current status of the constitutional review process. Kitonga opened the conversation by noting that the Committee of Experts on the Constitution's drafting exercise has been undertaken in an environment fraught with political speculation and intrigue. "Political leaders are afraid to show their hand too early," he observed, and stated that "for any politician, the current constitution is the ideal one," because it maintains a strong presidency that both political parties believe they can win in 2012. Since neither Party for National Unity (PNU) stalwarts (who support a strong presidential system) and Orange Democratic Movement (ODM) leaders (who claim to prefer a parliamentary system) know which position the committee will take, politicians have avoided public comment on the draft while preparing supporters to oppose it if its provisions are not to their liking. At the grassroots, "people have a deeply felt emotional belief in the importance of having one of their own ethnic group in power," commented Kitonga, which means politicians will be able to mobilize their respective ethnic blocs to oppose violently the draft constitution if the consultative and referendum processes are not managed carefully.

¶3. (C) Kitonga then reviewed the committee's current positions on the contentious issues which have scuttled previous attempts at constitutional reform. On the most controversial issue - the structure of executive power - Kitonga rejected both presidential and parliamentary systems as unworkable. A pure presidential system "is not possible to maintain because Kenyans are too divided," while a parliamentary system would be rejected because "Kenyans want to be able to vote for a president." The committee is working on a hybrid model similar to Tanzania's in which a directly elected president must appoint a prime minister from outside his party and region. "The division of powers in the current coalition in which the Prime Minister coordinates government business and the President provides overall direction appears workable," commented Kitonga.

¶4. (C) On other issues, Kitonga stated that the new constitution would devolve central government power to a three tier system

(central, provincial, and district governments). While expensive, Kitonga stated that "the Kenyan public demands devolution because of our long history of abuse of power by the central government." Within the judiciary, a supreme court will be established with lifetime appointments and rigorous vetting "to avoid political allegiances," and a constitutional court will be established to address urgent political crises such as the disputed 2007 election. Kitonga dismissed the debate over kadhi's courts as a non issue; the draft constitution will not change their mandate or function (Reftel).

¶5. (C) Kitonga articulated a relatively short timeline for consultation and a referendum on the proposed constitution. He wants to release the first "very rough" draft during September, followed by public consultation and the release of a final draft in December for parliamentary consideration. Once civic education programs are complete, the Committee of Experts would like to hold the referendum in March or April, but Kitonga noted that parliamentarians have indicated a preference for June. Such a short timeline is needed because "the longer this takes the more opposition will build." Concerned about the potential for ethnic violence around the referendum, Kitonga stated that the Commission will call for the referendum to be called off if the draft fails to win broad support.

¶6. (C) Asked how the US could be helpful to the commission's work, Kitonga requested support for technical experts, a nationwide civic education program which would emphasize to citizens the importance of compromise on the draft and the rejection of violence during the referendum. Private calls from the Secretary or President to both President Kibaki and Prime Minister Odinga urging acceptance of the draft before its release accompanied by a public statement of USG support would encourage the leaders to adopt compromise positions rather than holding to their absolutist preferences.

¶7. (C) In response to Kitonga's request, USAID has signed a grant a

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\$350,000 grant for the International Development Law Organization (IDLO) to provide technical experts to the committee. The experts will provide drafting expertise and comparative policy analysis on government systems (presidential, parliamentary, and hybrid), land policy, and the decentralization of political power and resources.

¶8. (C) COMMENT: Kitonga's instincts that a hybrid system of government is the most broadly acceptable to Kenyans is likely correct. If the PNU and ODM take opposite positions on the draft, the referendum process would likely be marked by violence, and the possible rejection of the draft. Indeed, Kitonga said that the referendum should not even be held unless President Kibaki and Prime Minister Odinga agree on the structure of executive power and signal that to their teams and the Committee of Experts. END COMMENT.

RANNEBERGER